Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FRITO-LAY, INC.,

Petitioner,

v.

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, and SHERMAN PERKINS, on behalf of themselves and others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does section 301 of the Labor Management Relations Act preempt application of an otherwise independent statutory wage law if interpretation of a collective bargaining agreement is required to determine whether the plaintiffs are excluded from the statute's coverage?

2. Does application of a state-law, multi-pronged test avoid preemption by section 301 of the Labor Management Relations Act as long as the plaintiffs can "assert" a claim without reference to a collective bargaining agreement, which also contains relevant evidence?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below appear in the caption of the case. Petitioner Frito-Lay, Inc. is a subsidiary of PepsiCo, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 4

A. Frito-Lay's And The Union's Negotiations Concerning Route Salesmen 4

B. The Superior Court Of Washington Holds Plaintiffs' Claim Preempted 5

C. The Washington Court of Appeals Reverses 7

REASONS FOR GRANTING THE WRIT 7

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE PROPER APPROACH TO PREEMPTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT 8

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE WASHINGTON'S SECTION 301 PREEMPTION JURISPRUDENCE CONFLICTS WITH THIS COURT'S DECISIONS 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 9, 10, 17
Antol v. Esposto, 100 F.3d 1111 (3d Cir. 1997) 12, 13, 14
Atchley v. Heritage Cable Vision Associates, 101 F.3d 495 (7th Cir. 1996) 14
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 15
Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 17
Commodore v. University Mechanical Contractors, Inc., 839 P.2d 314 (Wash. 1992) 16
Ervin v. Columbia Distributing, Inc., 930 P.2d 947 (Wash Ct. App. 1997) 16
Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 ..... *passim*
Livadas v. Bradshaw, 512 U.S. 107 (1994) ..... *passim*
Ramirez v. Yosemite Water Co. Inc., 978 P.2d 2 (Cal. 1999) 18
Schneider v. Snyder's Foods, Inc., 976 P.2d 134, (Wash. Ct. App. 1999) *appeal denied*, 989 P.2d 1141 (Wash. 1999) *cert. denied*, 120 S. Ct. 1573 (2000) 14, 16, 18
Self v. United Parcel Service, Inc., 970 P.2d 582 (N.M. 1998) 14
Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) .. 9, 13
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 8

STATUTES

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES

Page

29 U.S.C. § 185(a) 1, 2
29 U.S.C. §§ 201 *et seq* 4
Wash. Admin. Code § 296-128-540 . . . . . 4, 6
Wash. Rev. Code § 49.46.010 . . . . . 2, 17
Wash. Rev. Code § 49.46.130 . . . . . 3, 17
Wash. Rev. Code §§ 49.46 *et seq* 4

MISCELLANEOUS

Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. Rev. 687 (1997) . 12

Grabar, *Labor Law, Antol v. Esposto: The Third Circuit Expands Preemption Under the Labor Management Relations Act*, 42 Vill. L. Rev. 1995 (1997) 12

Nelson, *Section 301 of the LMRA Does Not Require Preemption of a Minimum State Labor Standard if the Legal Character of the Claim is Independent of the Rights in a Collective Bargaining Agreement: Livadas v. Bradshaw*, 36 B.C. L .Rev. 330 (1995) . 10, 13

Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209 (1989) 16

Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 Berkeley J. Emp. & Lab. L. 1 (1996) . . 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Frito-Lay, Inc. ("Frito-Lay"), respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals of the State of Washington, holding that the respondents' statutory overtime claim was not preempted by the Labor Management Relations Act, 29 U.S.C. § 185(a), where the respondents could offer evidence that they were covered under the Washington statute without reference to the collective bargaining agreement.

OPINIONS BELOW

The Supreme Court of Washington order denying Frito-Lay's Petition for Review (App. 1a-2a) is published at 140 Wash. 2d 1003 (2000). The Washington Court of Appeals opinion (App. 5a-13a) is published at 979 P.2d 488 (1999). The January 14, 1998 order of the Superior Court of Washington granting Frito-Lay's Motion for Summary Judgment (App. 23a-29a) is not reported.

JURISDICTION

The Washington Court of Appeals entered its opinion on July 6, 1999. On September 3, 1999, the Washington Court of Appeals denied Frito-Lay's timely-filed Motion for Reconsideration (App. 3a-4a). The Supreme Court of Washington denied Frito-Lay's timely Petition for Review on February 29, 2000. Frito-Lay now invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

Washington's Minimum Wage Act provides in relevant part:

49.46.010. Definitions

As used in this chapter:

* * * *

(5) "Employee" includes any individual employed by an employer but shall not include:

* * * *

(c) Any individual employed ... in the capacity of outside salesman as those terms are defined and delimited by rules of the director [of labor and industries].

* * * *

Wash. Rev. Code § 49.46.010.

49.46.130. Minimum rate of compensation for employment in excess of forty hour work week—Exceptions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c)[.]

* * * *

Wash. Rev. Code § 49.46.130.

The Washington Administrative Code provides in relevant part:

296-128-540. Outside salesman

The term "individual employed in the capacity of outside salesman" in RCW 49.46.010(5)(c) shall mean any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including

incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

Wash. Admin. Code § 296-128-540.

STATEMENT

A. Frito-Lay's And The Union's Negotiations Concerning Route Salesmen

For decades, Frito-Lay has negotiated with local affiliates of the International Brotherhood of Teamsters ("the Union") representing the company's route or bin salesmen ("route salesmen") about issues of job classification, job duties, and compensation structure. The respondents are 11 current or former route salesmen of Frito-Lay's approximately 180 route salesmen employed in Washington. The terms and conditions of their employment, as well as hundreds of other employees in various classifications, are embodied in a series of collective bargaining agreements ("CBA"), the last at issue being the November 1994 CBA.

With state and federal wage-and-hour laws as a backdrop, Frito-Lay and the Union specifically addressed the classification of route salesmen and treated them as "outside salesmen" for purposes of the Washington Minimum Wage Act ("MWA"), Wash. Rev. Code §§ 49.46 *et seq.*, and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* Importantly, the MWA excludes from coverage as an "employee" "[a]ny individual employed ... in the capacity of outside salesman." *See* §§ 49.46.010(5)(c); 49.46.130(2)(a). By excluding outside salesmen from eligibility for overtime pay, the MWA permits these salesmen to be compensated through salary and commission. Recognizing these alternatives, the Union, throughout five CBA periods spanning more than 15 years,

bargained for and treated the route salesmen classification as "outside salesmen" who were excluded from the MWA's overtime pay requirement but were eligible for commission instead. In fact, the CBA does not provide for a route salesmen classification that is, alternatively, paid on an hourly basis and subject to overtime pay.

Route salesmen are responsible for selling the full line of Frito-Lay products to present and potential customers on their routes. According to the CBA, they receive a guaranteed base salary plus commission. In conformity with the regulatory definition of an "outside salesman," Frito-Lay route salesmen work self-determined hours under minimal supervision. Consequently, route salesmen's hours are not tracked.

In addition to their right to grievance and arbitration of disputes (App. 28a), individual route salesmen are entitled, under the 1994 CBA's "Route-Review Procedure," to have their route reviewed and restructured to reduce hours worked or enhance their ability to earn commission. This review procedure was specifically crafted by Frito-Lay and the Union to avoid excessive hours and ensure that route salesmen continue functioning as outside salesmen. While four of the respondents did invoke the special review procedure, none pursued the remedy to its conclusion. Moreover, none of the respondents challenged their job classification under the CBA's general grievance procedure.

Despite their bargained-for classification and the CBA grievance procedures, the respondents filed this action on February 16, 1996 against Frito-Lay charging willful failure to provide overtime wages under the MWA. (App. 5a) Notwithstanding that their co-workers voted the Union to act as their exclusive bargaining agent, respondents seek to represent a class of Washington route salesmen, and claim entitlement to back pay, double damages and injunctive relief. (App. 5a)

B. The Superior Court Of Washington Holds Plaintiffs' Claim Preempted

Frito-Lay moved for summary judgment, arguing that the respondents' claim was preempted by section 301 of the Labor Management Relations Act ("LMRA") because a threshold determination of whether the respondents were covered under the MWA necessarily triggered analysis of the CBA and the historical course of dealing between Frito-Lay and the Union. (App. 7a) Specifically, the MWA scheme's multi-pronged definition of an "outside salesman" considers: (1) whether the person is employed "for the purpose of" making sales or performing sales activities; (2) whether the person is regularly engaged in sales activities; (3) whether the employer has no control over the person's hours; (4) the ratio of sales activities to non-sales activities; (5) whether the person is paid salary or commission; (6) whether the person is "advised of his status as 'outside salesman.'" *See* Wash. Admin. Code § 296-128-540.

Frito-Lay asserted that, in order to determine whether the respondents qualify as "outside salesmen" under this test, it is necessary to construe the CBA's terms. (App. 19a) Among other things, Frito-Lay pointed out that analysis of the CBA would be necessary to determine the respondents' employment terms and the parties' intent regarding whether route salesmen were supposed to function as outside salesmen. Thus, Frito-Lay argued that under *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988), respondents' MWA claim was preempted because resolution of the claim turned in part on interpretation of the CBA.

The Superior Court of Washington agreed that the MWA claim was preempted, and granted Frito-Lay's summary judgment motion on January 14, 1998. (App. 27a) The court stated:

> [A]s a matter of law, the issue of plaintiffs' job description and classification is inextricably intertwined with the CBA, and the question of statutory interpretation of outside salesmen does not exist independent of the CBA, which describes plaintiffs as outside salesmen. Because the issue requires interpretation and construing of the CBA, as well as interpretation of practices, procedures and industrial common law, section 301 ... preempts and federal law applies to the ... claims.

(*Id.* at 27a-28a) With respondents' MWA claim preempted, the court compelled arbitration of the matter in accordance with the CBA's arbitration clause. (*Id.* at 28a)

C. The Washington Court of Appeals Reverses

On July 6, 1999, the Washington Court of Appeals reversed. (App. 7a) The court concluded that there was no preemption because:

> [t]he trial court does not need to interpret the CBA in order to analyze the plaintiffs' status as outside salesmen.... The employees' burden is to show that they have an independent, nonnegotiable, state-law right ... [and t]hey may do so with evidence outside of the CBA.

(*Id.* at 11a, 12a)

Subsequently, Frito-Lay filed a Motion for Reconsideration that was denied on September 3, 1999. (App. 3a) Frito-Lay's Petition for Review to the Supreme Court of Washington was denied on February 29, 2000. (App. 1a)

REASONS FOR GRANTING THE WRIT

This case provides a needed opportunity for this Court to address questions raised, but left unanswered, in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and *Livadas v. Bradshaw*, 512 U.S. 107 (1994), concerning preemption under section 301 of the Labor Management

Relations Act. Specifically, review should be granted here in order to provide guidance to the lower courts on the proper approach to preemption of state statutory claims that derive from a legal source independent of a collective bargaining agreement, yet require analysis of the agreement for their resolution. Left without such guidance, lower courts have developed conflicting approaches. Indeed, this Court has itself observed that lower courts "have not been entirely uniform in their understanding and application" of section 301 preemption doctrine. *Livadas*, 512 U.S. at 124 n.18. These conflicting approaches have percolated in the lower courts long enough; review by this Court now is necessary to resolve the conflict and ensure that the lower courts apply a uniform standard in resolving section 301 preemption issues. Moreover, the specific approach developed by the Washington courts and applied in this case is completely inconsistent with this Court's existing section 301 jurisprudence. Review thus is necessary to bring the Washington state courts in line with this Court's decisions.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE PROPER APPROACH TO PREEMPTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT

The evolution of section 301 preemption has left a gap with respect to treatment of state-law claims, like the MWA claims here, that are based on otherwise independent statutory rights, but that require interpretation of a collective bargaining agreement. This Court initially dealt with preemption under section 301 of the LMRA in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The *Lincoln Mills* Court read the text of section 301 to authorize development of a uniform body of federal common law for the interpretation and enforcement of collective bargaining agreements, "in large part to assure that agreements to arbitrate grievances would be enforced,

regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution." *Livadas*, 512 U.S. at 121-22 (restating the holding of *Lincoln Mills*, 353 U.S. at 455-56).

Next, in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), the Court clarified that collective bargaining agreements must be interpreted according to federal law because:

> the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation ... [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Id. at 103-04. The Court concluded that state-law rules of contract interpretation therefore were preempted by federal labor law. *See id.* at 104.

With these purposes in mind, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), ruled that the preemption "analysis must focus ... on whether ... evaluation of the ... claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. Applying this analysis, *Lueck* held that a state tort action for bad-faith handling of a disability claim was preempted where the claim derived from the collective bargaining agreement's disability provisions. *See id.* at 218-19. After *Lueck*, therefore, state claims were considered preempted "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220. Only this result would "preserve the central role of arbitration." *Id.* at 219. As the Court explained:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, ... as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the

> arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 220. *Lueck* emphasized, however, that "not every dispute ... tangentially involving a provision of a collective agreement, is pre-empted by § 301," and that "§ 301 ... [does not] grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Id.* at 211-12.

This Court built on *Lueck* in *Lingle v. Norge Div. of Magic Chef, Inc.*, holding that section 301 did not preempt a state tort action for retaliatory discharge where the claim did not turn on the meaning of any collective bargaining agreement provision. *Lingle*, 486 U.S. at 407. *Lingle*'s basic approach to preemption flowed from *Lueck*; as the *Lingle* Court explained:

> If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law ... is pre-empted and federal labor-law principles ... must be employed to resolve the dispute.

Id. at 406. Focusing on whether interpretation of a collective bargaining agreement is "required," *id.* at 413, *Lingle* recognized that claims emanating from independent state laws may still be preempted if "application" of those laws "requires the interpretation of a collective-bargaining agreement." *Id.* Specifically, *Lingle* noted that "[i]t is conceivable that a State could create a remedy" that, although otherwise independent of a collective bargaining agreement, "nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301." *Id.* at 407-08 n.7. *See generally*, Nelson, *Section 301 of the LMRA Does Not Require Preemption of a Minimum State Labor Standard if the Legal Character of the Claim is Independent of the Rights in a Collective Bargaining Agreement: Livadas v. Bradshaw*, 36 B.C. L. Rev. 330, 334-35 (1995) (asserting that "the [Supreme] Court has recognized

that situations may arise when section 301 ... requires preemption of a ... claim that derives from a state substantive right").[1]

Then, six years ago in *Livadas v. Bradshaw*, this Court seemed to shift the focus of section 301 preemption from the need for interpretation of a collective bargaining agreement, to "the legal character of a claim." *Livadas*, 512 U.S. at 123. As *Livadas* explained, the key factor in "decid[ing] whether a state cause of action may go forward" should be whether the state law is "'independent' of rights under the collective-bargaining agreement." *Id.* at 123-24. Accordingly, *Livadas* held that section 301 did not preempt a state wage and penalty law where it was "a question of state law, entirely independent of any understanding embodied in the collective-bargaining agreement." *Id.* at 125. At the same time, *Livadas* did not appear to eliminate from the section 301 preemption analysis any assessment of the extent to which a state-law claim would involve interpretation of a collective bargaining agreement. Rather, the *Livadas* Court engaged in an analysis of the extent to which the state law would require construing the meaning of the collective bargaining agreement and found no preemption only after noting that the agreement was merely consulted on a tangential issue of damages computation. *See id.* at 124-25. *Livadas* also expressly recognized, but just as expressly left unresolved, the scenario presented by this case—*i.e.*, "concededly 'independent' state-law litigation [that] may

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[1] *Lingle* described a state remedy's independence from a collective bargaining agreement by using the term "nonnegotiable." Here, while the MWA clearly derives from a source independent of any collective bargaining agreement, the MWA remedy cannot be called nonnegotiable. Rather, because specified categories, such as outside salesmen, are "excluded" from the MWA, the Washington legislature crafted the MWA in such a way as to allow these excluded employees to bargain over wages and classifications. Accordingly, Frito-Lay has adopted the "independent" terminology used by the Court in *Livadas*.

nonetheless entail some collective-bargaining agreement application." *Id.* at 124 n.18.

In the wake of *Livadas*, therefore, it is unclear precisely what approach lower courts should take in evaluating whether application of "independent" state law is preempted. Specifically, it is clear under *Lingle* that if a state claim depends on the interpretation of a collective bargaining agreement, then it is preempted under section 301. *See Lingle*, 486 U.S. at 413. And under *Livadas*, it is clear that there is no preemption if a state claim's "legal character" is "independent" and any reference to a collective bargaining agreement is only tangential. *See Livadas*, 512 U.S. at 123-25. But it is unclear whether there is preemption where a state law—like the MWA overtime claim here—has an "independent" legal character, but "entail[s] some collective-bargaining agreement application." *Id.* at 124 n.18. This Court took note of this scenario in *Livadas*, but left the issue unresolved.

Both the lower courts and commentators have identified and criticized the lack of clarity in the section 301 preemption framework in such circumstances. *See, e.g., Antol v. Esposto*, 100 F.3d 1111, 1115 (3d Cir. 1997) ("These general [section 301] principles ... draw no clear lines of demarcation and, as a consequence, section 301 preemption has been a fruitful source of litigation over the years."); Grabar, *Labor Law—Antol v. Esposto: The Third Circuit Expands Preemption Under the Labor Management Relations Act*, 42 Vill. L. Rev. 1995, 2037 (1997) (pointing out need for "clarification of the exact limits of ... section 301"); Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. Rev. 687, 702, 707 (1997) (labeling section 301 preemption doctrine "an awful mess," and noting that the "most recent section 301 opinions ... do little to clarify the test"); Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 Berkeley J.

Emp. & Lab. L. 1, 3, 17 (1996) (noting that LMRA preemption decisions have "shifted erratically among different tests for deciding which state laws cannot survive, sometimes shifting between several in a single opinion," and that "[m]any questions have been left unanswered—most notably, what is the test for preemption?"); Nelson, *supra*, at 339 (criticizing that *Livadas*' standard "shifts the focus from the state's need to interpret a collective bargaining agreement as the central issue of section 301, to the source of the claimed rights and duties asserted in the state claim"). As the Third Circuit has noted, the result is that "case law has not been completely consistent." *Antol*, 100 F.3d at 1115.

This case provides an appropriate vehicle for the Court to provide this needed guidance and fill the gap in section 301 jurisprudence. The Washington overtime claim here presents the precise open question noted in *Livadas*: the claim is statutory and "independent" of the collective bargaining agreement, but analysis of the agreement is required to determine whether the respondents are excluded from the MWA's coverage as "outside salesmen." Specifically, application of the "outside salesman" definition—especially the "purpose" of respondents' job, the make-up of respondents' job duties, their compensation structure and whether respondents were "advised of [their] status" as outside salesmen—necessitates interpretation of the collective bargaining agreement's terms.

Without guidance from this Court, lower courts faced with such scenarios not only are left unclear on the proper approach, but necessarily will develop conflicting approaches, undermining the uniformity that should apply to preemption under section 301. For example, in addition to the decision below and other decisions of the Washington courts, *e.g.*, *Schneider v. Snyder's Foods, Inc.*, 976 P.2d 134 (Wash. Ct. App. 1999), *appeal denied*, 989 P.2d 1141 (Wash. 1999), *cert. denied*, 120 S. Ct. 1573 (2000), other state courts have

adopted a reading of *Livadas* in which the state claim's independent character ended the analysis and was dispositive. Specifically, the New Mexico Supreme Court in *Self v. United Parcel Serv., Inc.* 970 P.2d 582, 587 (N.M. 1998), held that regardless of whether the state claim would entail collective bargaining agreement interpretation—which the court recognized typically meant preemption—it could avoid preemption through adoption of an essentially per se rule that claims "for violations of any state-law rights that are legally independent of any right established by the collective bargaining contract," are not preempted. *Id.*

In contrast, the Seventh Circuit, applying the *Lingle* contract interpretation test, found a statutory claim involving the timing of wage payment to be preempted because interpretation of the collective bargaining agreement would be required to determine when the employer's obligation to pay wage increases and bonuses arose. *See Atchley v. Heritage Cable Vision Assoc.*, 101 F.3d 495, 500-01 (7th Cir. 1996). The court acknowledged that the state-law claim was independent, but pointed to *Lingle*'s suggestion that even state law with such a legal character could be preempted. *See id.* at 501. Thus, the Seventh Circuit reached a result entirely opposite of the result called for by the analysis in *Self*, and in the court below. *See also Antol*, 100 F.3d at 1120-21 (holding claim under state wage law preempted by section 301 and distinguishing *Livadas* where that case involved no dispute over contract terms).[2]

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[2] This Court alluded to yet a third approach in *Livadas* in noting that "[h]olding the plaintiff's cause of action substantively extinguished may not ... always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." *Livadas*, 512 U.S. at 124 n.18. Indeed, in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), the Court described a two-step approach in which the arbitrator would first interpret the collective bargaining agreement terms implicated by state law, then the claim would proceed to court, deferring to the

Conflicts such as these stem entirely from the preemption analysis selected. And the presence of such conflicts is particularly unwarranted since ensuring uniformity in the area of collective bargaining agreements is the very reason that section 301 preemption was developed. *See, e.g., Lucas Flour*, 369 U.S. at 103-04. Only this Court can restore uniformity by clarifying the proper approach to section 301 preemption. Review therefore should be granted.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE WASHINGTON'S SECTION 301 PREEMPTION JURISPRUDENCE CONFLICTS WITH THIS COURT'S DECISIONS

Review also is warranted here because the Washington courts have adopted an extreme approach to section 301 preemption that conflicts with this Court's decisions. This Court has made clear that section 301 preemption applies if substantive "resolution" of a state-law claim turns on interpretation of a collective bargaining agreement. *See Lingle*, 486 U.S. at 406.

But the Washington courts, as evidenced by the decision below, App. 5a-13a, have devised a rigid, per se approach that asks only whether the plaintiff can "assert" his claim in a way that states a prima-facie case without reliance on a collective bargaining agreement. If the state claim can be so plead, Washington courts rule that the claim is not preempted by

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arbitrator's conclusions concerning the contract. *See id.* at 741 n.19 (discussing a Fair Labor Standards Act claim).

section 301.[3] *See Commodore v. Univ. Mechanical Contractors, Inc.*, 839 P.2d 314, 319 (Wash. 1992).

In the decision below, the court found no preemption because respondents could offer evidence of their coverage under the MWA without referencing the collective bargaining agreement. *See* App. 11a-12a; *see also* App. 15a, 21a; *Commodore*, 839 P.2d at 323 (holding that various torts were not preempted since they could have been brought in the absence of a collective bargaining agreement, and that employer's defense which implicated the agreement did not operate to preempt claim); *Ervin v. Columbia Distrib., Inc.*, 930 P.2d 947, 951 (Wash. Ct. App. 1997) (applying test and holding that plaintiff's MWA overtime claim was not preempted since he could assert it without reliance on the collective bargaining agreement); *Schneider*, 976 P.2d at 138 (same). And in adopting this per se approach, the Washington courts expressly rejected this Court's statement in *Lingle*—which the Washington courts labeled "cryptic"—that even independent state claims would be preempted if they required interpretation of a collective bargaining agreement. *See Commodore*, 839 P.2d at 319.

Thus, the decision below plainly conflicts with this Court's section 301 decisions. The prima-facie-case test used by the lower court substantially restricts the scope of section 301 preemption, and encourages artful pleading by plaintiffs seeking to circumvent the grievance and arbitration provisions of collective bargaining agreements. Moreover, because this test looks to only a plaintiff's prima-facie case, an employer's

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[3] Washington's prima-facie-case preemption test announced in *Commodore* is based on a student note, Marcus, note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209 (1989). Criticizing this authority, two judges concurred only in result, commenting that "[s]urely there is better authority for a reasoned opinion." *Commodore*, 839 P.2d at 324 (concurring opinion).

defense that turns on the collective bargaining agreement could not then operate to preempt a state claim—thus deciding an important preemption issue that this Court has expressly left open. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987) ("intimat[ing] no view on the merits" of an employer's argument that a state claim is preempted when a defense requires interpretation of a collective bargaining agreement).

Such an extreme approach substantially undermines the very purpose of section 301 preemption by permitting precisely what this Court has sought to avoid—namely, a "rule that permitted an individual to sidestep available grievance procedures." *Lueck*, 471 U.S. at 220. Indeed, respondents' course of conduct here illustrates the problem posed by the lower court's standard. The collective bargaining agreement here provided for two remedies negotiated by the Union and Frito-Lay for employees dissatisfied with their classification as a route salesman: the regular grievance and arbitration procedure and a special "Route-Review Procedure," which was included in the CBA to ensure that route salesmen's jobs were configured appropriately and conformed with the outside sales definition. Several of the respondents initiated such review procedures, but they ultimately abandoned the CBA's remedy and, instead, filed suit. The lower court's decision to permit the suit to go forward through application of the prima-facie-case test thus sanctions a blatant circumvention of the collective bargaining agreement, and destroys the proper balance between federal labor policy and state law.[4]

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[4] Indeed, in taking such a blunt approach, the court below ignored the Washington legislature's attempt to strike a balance between state statutory rights and due deference to the federally-sanctioned collective bargaining process. Specifically, because categories of employees such as outside salesmen are not merely exempted from certain provisions, but are excluded altogether from the MWA, *see* Wash. Rev. Code §§ 49.46.010, 49.46.130, the MWA actually adopts a scheme under which employers and represented employees essentially can agree to opt-out of the statute.

Moreover, as the decision below also illustrates, Washington's per se, prima-facie test for LMRA preemption not only conflicts with this Court's decisions, but also has the potential to improperly limit employers by diminishing the role of the collective bargaining agreement. In other words, to avoid section 301 preemption, a state court may be inclined to limit reference to a collective bargaining agreement. *See, e.g.*, *Schneider*, 976 P.2d at 138 (holding that it "need not interpret" the collective bargaining agreement to determine whether route drivers met the definition of "outside salesman" where there was other evidence as to their job duties).

But, analyzing the collective bargaining agreement should be a central part of the determination of whether respondents satisfy Washington's definition of an "outside salesman." As the California Supreme Court noted in *Ramirez v. Yosemite Water Company, Inc.*, 978 P.2d 2 (Cal. 1999), a proper analysis of the "outside salesman" exclusion requires consideration not only of an employee's evidence, but also of "whether the employee's practices diverge[] from the employer's realistic expectations," to avoid a situation in which an employee underperforms and thereby evades a valid exemption. *Id.* at 13. Likewise, the court here should have construed the agreement in determining the "purpose" of respondents' jobs, the details of respondents' compensation, the nature of their duties, whether respondents were "advised" that they were classified as outside salesmen, and Frito-Lay's (and the Union's) expectations about respondents' job. To the extent that the standard adopted below limited consideration of the collective bargaining agreement in resolving the MWA claim, it improperly supplants the agreement from the prime role granted it under the LMRA.

CONCLUSION

For all these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 30, 2000

APPENDIX

THE SUPREME COURT
OF WASHINGTON

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, and SHERMAN PERKINS, on behalf of themselves and others similarly situated, Respondents, v. FRITO-LAY, INC., Petitioner.	)	NO. 68662-9 **ORDER** C/A NO. 42078-0-1

Department II of the Court considered this matter at its February 29, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 29th day of February, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, and SHERMAN PERKINS, on behalf of themselves and others similarly situated,	)	NO. 42078-0-1 DIVISION ONE **ORDER DENYING MOTION FOR RECONSIDERATION**
Appellant,	)	
vs.	)	
FRITO-LAY, INC.,	)	
Respondent.	)	

The Respondent, Frito-Lay, Inc., having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 3rd day of September, 1999.

/s/ Baker, J.
Presiding Judge

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, and SHERMAN PERKINS, on behalf of themselves and others similarly situated,	)	NO. 42078-0-1 DIVISION ONE **PUBLISHED OPINION**
Appellant,	)	FILED: July 06, 1999
vs.	)	
FRITO-LAY, INC.,	)	
Respondent.	)	

BAKER, J.—Seeking class certification, several of Frito-Lay's employees sued the company for breach of contract and violations of the Washington Minimum Wage Act (MWA).[1] Frito-Lay moved for summary judgment arguing that the claims were preempted by federal law (section 301 of the Labor-Management Relations Act (LMRA)),[2] and should

[1] RCW 49.46. et. seq.

[2] 29 U.S.C. § 185.

either be dismissed or arbitration compelled under the terms of the collective bargaining agreement (CBA).

The employees voluntarily dismissed their breach of contract claims. The trial court granted summary judgment for Frito-Lay, ruling that the wage and hour claims were preempted by federal labor law. The court compelled arbitration of the statutory overtime claims under the arbitration provision of the CBA. The court declined to reach the employees' motion for class certification.

The employees appealed, and Frito-Lay filed a motion to dismiss the appeal arguing that the trial court order is not appealable as a matter of right and does not meet the criteria for discretionary review. A commissioner of this court granted discretionary review. He held that the "it was obvious error to find preemption and compel arbitration. Further it would be a useless act to engage in an arbitration of state-law claims if they are not subject to arbitration."[3] He suggested that Frito-Lay would have to distinguish the holdings in United Food[4] and Ervin[5] in order to succeed on appeal.[6] Because we agree with the analysis in the order granting discretionary review, and because Frito-Lay has not adequately distinguished

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[3] Commissioner's Ruling at 8.

[4] United Food and Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., 84 Wn. App. 47, 925 P.2d 212 (1996), review denied, 133 Wn.2d 1021 (1997).

[5] Ervin v. Columbia Distributing, Inc., 84 Wn. App. 882, 930 P.2d 947 (1997).

[6] Commissioner's Ruling at 8.

unfavorable case law,[7] we reverse the summary judgment order and remand for a trial on the merits.

I

The MWA provides for enforcement of minimum employment standards and outlines the strong public policy of this state to provide overtime pay to promote employment opportunities.[8] The MWA requires employers to pay overtime to their employees unless the employee is a type specifically excluded by the statute.[9] Frito-Lay argues that the plaintiff-employees in this suit are "outside salesmen" and thus excluded by the statute.[10] Frito-Lay argues that the CBA must be relied upon to determine whether the plaintiffs are "outside salesmen" and therefore the disputed matter must proceed to arbitration as required by section 301.[11]

We recently held that independent, nonnegotiable, state-law based employment rights are not preempted by federal law.[12]

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[7] We are aware of Schneider v. Snyder's Bakery, 17312-7-III, a Division 3 case which was published by post-decision order and is in full accord with our holding herein.

[8] RCW 49.46.005.

[9] RCW 49.46.130, RCW 49.46.010.

[10] RCW 49.46.010(5)(c).

[11] 29 U.S.C. § 185; United Food, 84 Wn. App. at 50-51.

[12] See e.g. Wilson v. City of Monroe, 88 Wn. App. 113, 119, 943 P.2d 1134 (1997), review denied, 134 Wn.2d 1028 (1998). Compare Swinford v. Russ Dunmire Oldsmobile, Inc., 82 Wn. App. 401, 404, 409, 918 P.2d 186 (1996), review denied, 130 Wn.2d 1024 (1997) (CBA dependent state law breach of contract claim preempted by § 301); Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 839 P.2d 314 (1992) (independent tort claims not arising out of CBA not preempted by § 301).

In United Food and Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., employees of Ernst Home Center brought suit alleging that they were not paid for all of the hours they worked.[13] The court denied Ernst's motion to compel arbitration.[14] On appeal, this court was asked to decide whether section 301 of the LMRA preempted the state claim and required arbitration.[15] We held that

> federal labor law does not preempt claims that are based on state laws when those laws grant employees nonnegotiable, substantive rights and when adjudication of those rights does not depend upon a collective bargaining agreement.[16]

As is the case here, Ernst claimed that it was necessary to interpret the CBA to decide the state law claim.[17] We disagreed and held that pay stubs and payroll records could be used instead of the agreement.[18]

Disputes over the right to overtime under the MWA are specifically nonnegotiable, independent, state-law based employment rights which are not preempted by federal law.[19] Ervin v. Columbia Distributing, Inc. involved a claim for

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[13] 84 Wn. App. at 48.

[14] United Food, 84 Wn. App. at 50.

[15] United Food, 84 Wn. App. at 50.

[16] United Food, 84 Wn. App. at 51.

[17] United Food, 84 Wn. App. at 52.

[18] United Food, 84 Wn. App. at 53.

[19] See Ervin, 84 Wn. App. at 890-91.

compensation for unpaid overtime under the MWA.[20] The trial court ruled that Ervin was required to bring his claim through the CBA's grievance procedure and not through litigation.[21] On appeal, we held that

> Mr. Ervin could assert his state-law claims under RCW 49.46 without reliance on the collective bargaining agreement. The rights he attempts to assert under the state statute are independent of the agreement or the employer's practices and procedures, and resolution of the statutory claim will depend on the agreement only to determine the appropriate regular rate of pay.[22]

Further, we held that the MWA rights "may not be waived or altered by a collective bargaining agreement, and that employees are not required to arbitrate these 'nonnegotiable' claims."[23]

Columbia also argued that Mr. Ervin was an exempt "outside salesman".[24] The court held that summary judgment was inappropriate because WAC 296-128-540, and Mr. Ervin's statement "that his sales activities were only 'incidental' to his delivery responsibilities creates at least a genuine issue as to whether Mr. Ervin was an outside salesman."[25]

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[20] Ervin, 84 Wn. App. at 885.

[21] Ervin, 84 Wn. App. at 886.

[22] Ervin, 84 Wn. App. at 890.

[23] Ervin, 84 Wn. App. at 891 (footnote omitted), citing United Food, 84 Wn. App. 47, and Local 246 Utility Workers Union v. Southern California Edison Co., 83 F.3d 292 (9th Cir. 1996).

[24] Ervin, 84 Wn. App. at 894.

[25] Ervin, 84 Wn. App. at 895.

RCW 49.46.010(5)(a) provides: "'Employee' includes any individual employed by an employer but shall not include: . . . (c) Any individual employed. . .in the capacity of outside salesman as those terms are defined and delimited by rules of the director." "Director" refers to the Director of Labor and Industries[26] and the referenced rules are found in the Washington Administrative Code:

> The term 'individual employed in the capacity of outside salesman in' RCW 49.46.010(5)(c) shall mean any employee:
>
> (1)Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:
>
> (a)In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or
>
> (b)In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or
>
> (c)In demonstrating products or equipment for sale; or
>
> (d)In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and
>
> (2)Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not

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[26] United Food, 84 Wn. App. at 894.

> exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer:
>
> Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and
>
> (3)Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as 'outside salesman.'[27]

In this case, the trial court does not need to interpret the CBA in order to analyze the plaintiffs' status as outside salesmen. Independent evidence suggests that their sales responsibilities pale in comparison to their non-sales responsibilities. Thus the matter is not preempted by federal law. Summary judgment was improper because there is enough evidence in the declarations and depositions to raise a material question of fact that the plaintiffs were not outside salesmen.[28]

Were we to hold otherwise, employers and unions could waive employees' basic rights under the MWA without their consent and without effective redress. This would contradict the clear public policy in this state to provide and enforce basic minimum employment rights.[29]

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[27] WAC 296-128-540.

[28] Ervin, 84 Wn. App. at 895 ("Mr. Ervin's statement that his sale activities were only 'incidental' to his delivery responsibilities creates at least a genuine issue as to whether Mr. Ervin was an outside salesman. Summary judgment is not proper on this question.")

[29] RCW 49.46.005.

Our decision is consistent with Wright v. Universal Maritime Service Corp., where the CBA at issue required a specific grievance procedure for employment disputes.[30] After Wright was injured, stevedoring companies would not employ him "because a person certified as permanently disabled (which they regarded Wright to be) is not qualified to perform longshore work under the CBA."[31] Wright's ADA claim was dismissed without prejudice by the District Court, which held that Wright was required to pursue the grievance procedure.[32] The U.S. Supreme Court reversed and held that the section 301 presumption for CBA preemption "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of the CBA."[33]

The Supreme Court held in Wright that the CBA at issue did not preempt Wright's ADA claim. Similarly, in this case we hold that the CBA does not preempt the plaintiffs' MWA claim. The courts are in a better position to interpret the MWA than an arbitrator. The employees' burden is to show that they have an independent, nonnegotiable, state-law right. They may do so with evidence outside of the CBA.

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[30] -- U.S. --; 119 S. Ct. 391, 393, 142 L.Ed.2d 361 (1998).

[31] Wright, 119 S.Ct. at 393.

[32] Wright, 119 S.Ct. at 394.

[33] Wright, 119 S. Ct. at 395.

REVERSED.

/s/ Baker, J.

WE CONCUR:

/s/ Agid, A.C.J.

/s/ Ellington, J.

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, and SHERMAN PERKINS, on behalf of themselves and others similarly situated,	)	NO. 42078-0-1
Petitioners,	)	COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW
v.	)	
FRITO LAY, INC., a corporation,	)	
Respondent.	)	

Several employees filed a notice of appeal from the trial court's order holding their overtime claims under the Washington Minimum Wage Act are preempted by federal law and compelling arbitration under the collective bargaining agreement. Frito-Lay seeks a ruling that the trial court order is not appealable and is not subject to discretionary review. The trial court order is fundamentally an order compelling arbitration and is not subject to appeal as a matter of right. But

discretionary review is appropriate because the statutory overtime claim can be presented without reliance on the employment contract or upon the industrial common law, and therefore federal law does not preempt. Discretionary review is granted.

FACTS

Several employees sued Frito-Lay for breach of contract and violations of the Washington Minimum Wage Act, RCW 49.46. They also sought to certify a class action. Frito-Lay moved for summary judgment arguing that the claims are preempted by federal law and should either be dismissed or arbitration should be compelled under the terms of the Collective Bargaining Agreement. The employees voluntarily dismissed their breach of contract claims. The trial court granted summary judgment that the wage and hour claims are preempted under federal labor law, and compelled arbitration of the statutory overtime claims under the arbitration provision of the Collective Bargaining Agreement. In view of the other rulings, the trial court declined to reach the employees' motion for class certification.

The employees filed a notice of appeal. Frito-Lay filed a motion to dismiss the appeal arguing that the trial court order is not appealable as a matter of right and does not meet the criteria for discretionary review.

DECISION

No Appeal as a Matter of Right. The employees argue that the ruling that federal law preempts is a final decision that in effect determines the action, and no Washington case has addressed the appealability of an order compelling arbitration under section 301 of the Labor Management Relations Act. But the portion of the summary judgment regarding preemption is not a final judgment and does not determine an action. Neither is the portion of the trial court order compelling arbitration appealable. Washington case law is now

clear that an order compelling arbitration is not appealable as a matter of right.[34] No meaningful basis exists to carve out an exception for an order compelling arbitration under a collective bargaining agreement.

Discretionary Review. Discretionary review is available only:

> (1) If the superior court has committed an obvious error which would render further proceedings useless; or
>
> (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.[35]

Under recent Washington decisions, the statutory overtime claims are not preempted under section 301 of the LMRA. The standard for federal preemption of statutory wage claims has recently been addressed in two Washington decisions. In United Food & Commercial Workers Local 1001 v. Mutual Benefits Life Ins. Co.,[36] employees asserted a claim for "off the clock" wages under the Washington Minimum Wage Act. This court held that under section 301, federal law does not preempt the state wage claim for "off the clock" work because the basic

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[34] American States Ins. Co. v. Chun, 127 Wn. 2d 249, 254, 897 P.2d 362 (1995).

[35] RAP 2.3(b).

[36] 84 Wn. App. 47, 925 P.2d 212 (1996), review denied, 133 Wn.2d 1021 (1997).

statutory rights provided by the Washington wage and hour statute may not be waived or altered by a collective bargaining agreement and employees are not required to arbitrate these "nonnegotiable" claims. The court held that only those claims founded directly on rights created by a collective bargaining agreement and those substantially dependent on analysis of a collective bargaining agreement are governed by section 301:

> Stated conversely, federal labor law does not preempt claims that are based on state laws when those laws grant employees nonnegotiable, substantive rights and when adjudication of those rights does not depend upon a collective bargaining agreement.[37]

This court rejected the employer's argument that it is necessary to interpret the collective bargaining agreement to determine whether it "permitted" the employees to work because:

> When an employee's cause of action arises under state law and resolution of the dispute does not require interpretation of the collective bargaining agreement, the claim is considered independent of the agreement even though it may require addressing precisely the same set of facts as would arbitration under the agreement.[38]

This court rejected the employer's other arguments that provisions of the collective bargaining agreement, including a provision barring any "off the clock" practices, would trigger the preemption of the state statutory wage claims.

In Ervin v. Columbia Distributing, Inc.,[39] the court reached a similar conclusion as to a claim by an employee for unpaid

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[37] 84 Wn. App. at 51.

[38] 84 Wn. App. at 53.

[39] 84 Wn. App. 882, 930 P.2d 947 (1997).

overtime as a "driver-salesman," a position covered by the collective bargaining agreement. The Ervin court discussed the extent of preemption under section 301:

> Section 301 preempts application of state law to interpret or enforce collective bargaining agreements.
>
> Whether a state-law claim is preempted by section 301 depends on whether it is "independent" in the sense that "resolution of the state-law claim does not require construing the collective-bargaining agreement." The Washington Supreme Court has adopted the following test for analyzing section 301 preemption: "A state statutory or common law claim is independent of the CBA -- and therefore should not be preempted by section 301 -- if it could be asserted without reliance on an employment contract."
>
> A state-law claim is not preempted under section 301 solely because it arises out of the same factual circumstances that may have been involved in a contractual analysis.[40]

The court went on to determine that Ervin's overtime claims did not depend upon a construction of the collective bargaining agreement:

> In this case, Mr. Ervin could assert his state-law claims under RCW 49.46 without reliance on the collective bargaining agreement. The rights he attempts to assert under the state statute are independent of the agreement or the employer's practices and procedures, and resolution of the statutory claim will depend on the agreement only to determine the appropriate regular rate of pay. Moreover, denying the statutory protection to Mr. Ervin and other union workers like him would

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[40] 84 Wn. App. 889 (citations omitted).

> effectively chill their exercise of rights under the National Labor Relations Act and frustrate the very purpose of section 301 preemption.[41]

Frito-Lay argues that the determination whether the employees are "outside salesmen" does depend upon a construction of the collective bargaining agreement and upon the industrial common law and thus the claims should be preempted. Frito-Lay argues that a two tiered analysis must be made. If the job classification itself meets the outside salesman criteria, then the issue is resolved with no further inquiry. If it does not, then a "follow-on" analysis is required to determine if the practices of the employer and employee satisfy the criteria for an outside salesman. But I am not persuaded that there is any case law, statute, or administrative rule that adopts such an approach.

In Ervin the employer asserted that Ervin was an "outside salesman" exempt from the overtime provisions of the Washington Minimum Wage Act. The court noted the Department of Labor and Industries' definition of an outside salesman as an employee:

> (1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:
>
> (a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

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[41] 84 Wn. App. at 890.

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

WAC 296-128-540.[42]

The court held that this issue was not appropriate for summary judgment, without directly commenting on the relationship of the question of being an outside salesman to the issue of preemption under section 301. But the court unequivocally held there was no preemption of the statutory overtime claim; and that Ervin could assert his overtime claim without reliance on the collective bargaining agreement.

The fundamental question is whether the employees can assert their state-law overtime claims under RCW 49.46 without reliance upon the collective bargaining agreement or

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[42] Ervin, 84 Wn. App. at 894.

upon the "industrial common law" including practices and procedures relating to the employment relationship. Frito-Lay argues that the portion of the definition of an outside salesman that refers to "the purpose of the employment" requires reference to the collective bargaining agreement. But if Ervin is able to assert his overtime claim without relying upon his collective bargaining agreement, then the employees of Frito-Lay are in no different position. Frito-Lay offers no persuasive distinction.

It may be more debatable whether the materials provided to the trial court by Frito-Lay implicate the industrial common law in the form of the shop practices and procedures at Frito-Lay and the negotiations to tailor the job classification to satisfy the outside salesman requirements. Frito-Lay focuses upon this context of the negotiations of the Collective Bargaining Agreement, while the employees argue that the overtime right is "nonnegotiable" and negotiations of the parties are of no consequence. There is no showing that the employees must rely upon industrial common law to present their statutory overtime claim.

Further briefing on appeal may demonstrate a basis to distinguish or clarify the holdings in United Foods and Ervin but, based upon the materials provided to me, it was obvious error to find preemption and compel arbitration. Further it would be a useless act to engage in an arbitration of state-law claims if they are not subject to arbitration. The criteria for discretionary review are satisfied.

Now, therefore, it is hereby

ORDERED that discretionary review is appropriate and the acting clerk shall set a perfection schedule.

Done this 6th day of April, 1998.

/s/ James M. Verellen
Court Commissioner

THE HONORABLE JIM BATES

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

ROBERT HUNTLEY, et al.	
	No. 96-2-04926-3SEA
Plaintiffs,	
	ORDER ON MOTIONS
v.	
FRITO LAY, INC., a corporation,	
Defendant.	

THIS MATTER came before the Court on the following motions:

(1) Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims; (2) Frito-Lay's Motion To Compel Arbitration Under Collective Bargaining Agreement, To Stay Remaining Claims Pending Arbitration, And In The Alternative, To Transfer Claims To Mandatory Arbitration; (3) Plaintiffs' Motion To Dismiss Individual Contract Claims; and (4) Plaintiffs' Motion For Class Certification. The Court has considered the following:

- Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims;
- Frito-Lay's Motion To Compel Arbitration Under Collective Bargaining Agreement, To Stay Remaining Claims Pending Arbitration, And In The Alternative, To Transfer Claims To Mandatory Arbitration;

- Declaration Of Leonard B. Clegg In Support Of Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims, And Frito-Lay's Motion To Compel, and supporting exhibits;
- Declaration Of William S. Allen In Support Of Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims, And Frito-Lay's Motion To Compel, and supporting exhibits;
- Declaration Of Julie Orchard In Support Of Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims, And Frito-Lay's Motion To Compel, and supporting exhibits;
- Declaration Of Michael Debus In Support Of Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims, And Frito-Lay's Motion To Compel, and supporting exhibits;
- Declaration Of Nancy W. Anderson In Support Of Frito-Lay's Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims, And Frito-Lay's Motion To Compel, and supporting exhibits;
- Plaintiffs' Response To Defendant's Motion For Summary Judgment And To Compel Arbitration;
- Declaration Of Albert R. Johnson, Jr. In Opposition To Defendant's Motion For Summary Judgment, and supporting exhibits;
- Plaintiffs' Motion To Dismiss Individual Contract Claims;
- Defendant's Reply To Plaintiffs' Opposition To Motion For Summary Judgment And Motion To Compel;
- Declaration Of Rudy A. Englund In Support Of Frito-Lay's Reply Brief On Its Motion For Summary Judgment On Plaintiffs' Breach Of Contract And Statutory Wage Claims,

And Frito-Lay's Motion To Compel, and supporting exhibits thereto, including Declaration Of William Berry;

- Plaintiffs' Motion For Class Certification;
- Plaintiffs' Memorandum Of Law In Support Of Motion For Class Certification, and supporting exhibits;
- Declaration Of Robert Huntley In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Michael Hill In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Robert Henry In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Brent Dove In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Kenneth Reynolds In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Jackie Jewell In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Michael L. Morris In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of William Welch In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Engbert Borg In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Fred Bellows In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Sherman Perkins In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Jay Richards In Support Of Plaintiffs' Motion To Certify Class;

- Declaration Of Rob Williamson In Support Of Plaintiffs' Motion To Certify Class;
- Declaration Of Keith Thomson In Support Of Plaintiffs' Motion To Certify Class;
- Defendant's Memorandum In Opposition To Plaintiffs' Motion For Class Certification;
- Declaration Of Douglas E. Smith In Opposition To Plaintiffs' Motion For Class Certification and support-ing exhibits;
- Declaration Of Steve Kahns In Opposition To Plaintiffs' Motion For Class Certification;
- Declaration Of Michael Debus In Opposition To Plaintiffs' Motion For Class Certification;
- Declaration Of Randy Furuta In Opposition To Plaintiffs' Motion For Class Certification;
- Plaintiffs' Reply To Defendant's Opposition To Class Certification;
- Declaration Of Rob Williamson In Support Of Reply Of Plaintiffs On Class Certification, and supporting exhibits;
- Declaration Of Shawn Burnham In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Michael Fields In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Dave Goettle In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Richard Leetz In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Mark McConnell In Support Of Plaintiffs' Motion For Class Certification;

- Declaration Of Karl T. Merten In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Matthew Michel In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Patrick O'Neill In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Steven Patterson In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Tom Pilch In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of David Sitzenstock In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Jeff Sterio In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Beverly Warren In Support Of Plaintiffs' Motion For Class Certification;
- Declaration Of Dennis Wetherell In Support Of Plaintiffs' Motion For Class Certification;
- Five anonymous Declarations In Support Of Plaintiffs' Motion For Class Certification; and all of the other pleadings, papers, and filings herein.

Being fully advised in the premises, it is hereby

ORDERED that:

1. Plaintiffs' Motion To Dismiss Individual Contract Claims is GRANTED, and plaintiffs' common law individual employment contract claims are voluntarily dismissed;

2. Defendant's Motion For Summary Judgment is GRANTED for the reasons that, as a matter of law, the issue of plaintiffs' job description and classification is inextricably intertwined with the CBA, and the question of statutory

interpretation of outside salesmen does not exist independent of the CBA, which describes plaintiffs as outside salesmen. Because the issue requires interpretation and construing of the CBA, as well as interpretation of practices, procedures and industrial common law, section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts and federal law applies to the remaining claims set forth in plaintiffs' Second Amended Complaint;

3. Defendant's Motion To Compel Arbitration is GRANTED, and plaintiffs' claims regarding their job description, classification and entitlement to overtime compensation, if any, must proceed through arbitration pursuant to and in accordance with the Collective Bargaining Agreement between Frito-Lay, Inc. and International Brotherhood of Teamsters Locals 38, 117, 231, 252, 378, 589, 599 and 788 November 10, 1994 - October 5, 1997;

4. In light of the Court's rulings on the above motions, Plaintiffs' Motion For Class Certification need not be decided and said motion is therefore DENIED.

DATED this 14th day of January, 1998.

/s/ Jim Bates
JIM BATES
SUPERIOR COURT JUDGE

Presented by:

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Supreme Court, U.S.
FILED
JUN 30 2000
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(2)

No. 99-1912

In The

Supreme Court of the United States

FRITO-LAY, INC.,

Petitioner,

v.

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, AND SHERMAN PERKINS, on behalf of themselves and others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

All parties are listed on the cover page of this brief.

TABLE OF CONTENTS

Page

LIST OF PARTIES i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE WRIT 5
CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 6

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)..... 6

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)..... 7

Iowa Beef Packers v. Thompson, 405 U.S. 228 (1972)..... 5

Jefferson v. City of Tarrant, 522 U.S. 75 (1997)..... 1

Livadas v. Bradshaw, 512 U.S. 107 (1994).....5, 7

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)..... 7

STATE CASES CITED

Commodore v. University Mechanical Contractors, Inc., 120 Wash. 2d 120, 839 P.2d 314 (1992).....6, 7

Schneider v. Snyder's Foods, Inc., 95 Wash. App. 399, 976 P.2d 134, *rev. denied*, 139 Wash. 2d 1003, 989 P.2d 1141, *cert. denied*, 120 S. Ct. 1573 (2000)..... 3

FEDERAL STATUTES CITED

28 USC § 1257(a)..... 1

29 USC § 185..... 2, 4, 5

STATE STATUTES CITED

Wash. Rev. Code § 49.46.110.....2, 4

Wash. Rev. Code § 49.46.120..... 2

OPINIONS BELOW

The order of the Washington State Supreme Court denying Frito-Lay's Petition for Review (Pet. App. 1a-2a) is reported at 140 Wash. 2d 1003 (2000). The Washington State Court of Appeals decision (Pet. App. 5a-13a) is reported at 979 P.2d 488 (1999). The opinion of the Superior Court of the State of Washington for King County (Pet. App. 23a-29a) is not reported.

JURISDICTION

The Court of Appeals reversed the trial court's order dismissing respondents' complaint, and remanded the case for further proceedings. Absent settlement, the case will be tried on the merits of respondents' state law wage-and-hour claims. Frito-Lay maintains that respondents are exempt "outside salesmen" under state law. If Frito-Lay prevails on this defense, respondents' wage-and-hour claim will fail, for exemption is a complete defense to respondents' lawsuit. If Frito-Lay loses at trial, it may again seek review here once state court litigation is concluded.

Under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the decision of the Washington State Court of Appeals is accordingly not a "final judgment" under 28 USC § 1257(a).

STATUTES INVOLVED

29 USC § 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Wash. Rev. Code § 49.46.110:

Nothing in this chapter shall be deemed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish wages or other conditions of work in excess of the applicable minimum under the provisions of this chapter.

Wash. Rev. Code § 49.46.120

This chapter establishes a minimum standard for wages and working conditions of all employees in this state, unless exempted here from, and is in addition to and supplementary to any other federal, state, or local law or ordinance, or any rule or regulation issued thereunder. Any standards relating to wages, hours, or other working conditions established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, which are more favorable to employees than the minimum standards applicable under this chapter, or any rule or regulation issued

hereunder, shall not be affected by this chapter and such other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law.

STATEMENT OF THE CASE

Frito-Lay seeks review of an intermediate state appellate court decision reversing the trial court's dismissal of respondents' state law wage-and-hour claims, and its order sending the respondent's claims to arbitration under a collective bargaining agreement ("CBA").[1]

Respondents deliver Frito-Lay snack foods to retail sales outlets in western Washington state by truck. Frito-Lay pays them no overtime wages regardless of the number of hours they work in a work week.

Respondents are or were represented for collective bargaining purposes by separate Teamster local unions, all based in western Washington. The collective bargaining agreements do not provide for the payment of overtime for work in excess of forty (40) hours in a work week, and are in fact silent as to overtime.[2]

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[1] This is the second case to come before the Court this term involving overtime claims by delivery drivers in Washington state. *See Schneider v. Snyder's Foods, Inc.*, 95 Wash. App. 399, 976 P.2d 134, *rev. denied*, 139 Wash. 2d 1003, 989 P.2d 1141, *cert. denied*, 120 S. Ct. 1573 (2000).

[2] Frito-Lay's suggestion that it and the Teamsters agreed to treat respondents as exempt "outside salesmen" under the Washington Minimum Wage Act ("MWA") is, at best, a half truth. The CBA provided overtime for the respondent route

Respondents sued in King County Superior Court seeking payment for their overtime wages under the state Minimum Wage Act, Wash. Rev. Code §§ 49.46 *et seq.* Respondents sought certification as representatives of a class consisting of all delivery drivers employed by Frito-Lay in Washington, both union and non-union.

The trial court dismissed the complaint, holding respondents' claims preempted by § 301 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 185. (Pet. App. 23a-29a)[3] The court ordered the respondents' claims be submitted to arbitration under the CBA.[4]

The Washington State Court of Appeals reversed, and remanded the case for further proceedings. (Pet. App.

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salesmen until the mid-1980's when that clause was removed in bargaining at Frito-Lay's insistence. A Teamster representative testified in deposition that the Frito-Lay employees accepted that CBA "in lieu of going on strike for overtime." Another cautioned that acceptance of Frito-Lay's last and final offer removing the overtime provision did not signal union agreement that the employees were exempt. Finally, nowhere in the CBA is the exempt or non-exempt status of the respondents discussed.

[3] The trial court incorrectly held that the CBA described respondents in terms of the MWA exemption as "outside salesmen." (Pet. App. 27a-28a) The CBA describes respondents as "Route Salesmen" and "Bin Salesmen." The CBA is silent on the issue of overtime payments to the respondents. No job descriptions appear in the CBA.

[4] The CBA limits the arbitrator's authority to "grievances," defined under the contract as "disputes arising between the Employer and employees . . . with respect to the interpretation or the terms of this Agreement . . ."

5a-13a) The Washington State Supreme Court denied review. (Pet. App. 1a-2a)

REASONS FOR DENYING THE WRIT

A. The Decision Below is a Correct Application of This Court's Decisions

However confusing the state of section 301[5] preemption may be (Pet. 12), this is not the case in which it should be clarified. The decision below in no way threatens the primacy of arbitration in labor relations where, as here, the CBA precludes arbitral consideration of state law claims.

The trial court sent the respondents' MWA claims to arbitration under the CBA despite that an arbitrator appointed under the agreement would lack jurisdiction over those state law claims. *See Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972) (writ of certiorari dismissed as improvidently granted in Fair Labor Standards Act case where collective bargaining agreement limited arbitral jurisdiction to grievances "pertaining to a violation of the agreement"). Since respondents' state law claims are independent of the CBA and cannot be adjudicated under it in any event, the policies undergirding section 301 preemption are not served by pre-emption. *Livadas v. Bradshaw*, 512 U.S. 107, 122-23 (1994) ("[T]he preemption rule has been applied only to assure that the purposes animating 301 will [not] be frustrated . . . by state laws

[5] 29 USC § 185.

purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement' " citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)).

The Court has long recognized that labor arbitration is an unsuitable forum for statutory wage-and-hour claims in any event. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981). Unions are concerned with collective rights, not necessarily individual ones, and may, without violating the duty of fair representation, "permit some employees' statutorily granted wage-and-hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Id.* at 742. Here there is evidence that the Teamsters acceded to Frito-Lay's demand to remove overtime pay from the contract in lieu of calling a strike. As such, sending any portion of respondents' claims to an arbitrator (who is hobbled by the CBA against consideration of state law) would be a useless undertaking.

B. The State Supreme Court's *Commodore* Decision Protects State and Federal Interests

The Washington State Supreme Court has adopted a rule which accommodates the state's interest in enforcement of its wage-and-hour laws while protecting the federal interest in uniform interpretation of collective bargaining agreements. In *Commodore v. University Mechanical Contractors, Inc.*, 120 Wash. 2d 120, 839 P.2d 314 (1992) the court held that employer defenses to state

law claims implicating a collective bargaining agreement do not require dismissal of the complaint. Rather, the court may adjudicate the defense under its concurrent section 301 jurisdiction. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).[6] The *Commodore* court recognized that the law to be applied to the employer's contract defense was federal law. *Commodore*, 120 Wash. 2d at 131-32.

The state Supreme Court's approach to section 301 preemption in *Commodore* is a sensible accommodation of both federal and state interests. The defendant's proposed solution – outright dismissal of union-represented employees' wage-and-hour claims and referral of those claims to an impotent arbitrator – is manifestly unreasonable, and fails to accommodate the state of Washington's interest in uniform enforcement of its wage-and-hour laws.[7]

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[6] *See Livadas*, 512 U.S. at 123-24 n.17: "[W]hile contract interpretation disputes must be resolved in the bargained-for arbitral realm . . . 301 does not disable state courts from interpreting the terms of collective bargaining agreements in resolving nonpreempted claims," *citing Charles Dowd Box Co.*

[7] *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985): "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers."

CONCLUSION

The Petition should be denied.

June 30, 2000

Respectfully submitted,

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No. 99-1912

IN THE
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FRITO-LAY, INC.,

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Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Washington

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT HAS JURISDICTION TO REVIEW THE WASHINGTON COURT OF APPEALS' DECISION 1

II. RECENT AUTHORITY INDICATES THAT THE CONFLICT OVER SECTION 301 PREEMPTION IS DEEPENING 1

III. THE PETITION DOES NOT INVOLVE AN ARBITRATOR'S POWER TO ADJUDICATE STATE CLAIMS 3

IV. WASHINGTON'S APPROACH TO SECTION 301 PREEMPTION CONFLICTS WITH THIS COURT'S APPROACH 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 4
Atchley v. Heritage Cable Vision Assocs.,
101 F.3d 495 (7th Cir. 1996) 2
Belknap, Inc. v. Hale,
463 U.S. 491 (1983) 1
Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 4
Commodore v. Univ. Mechanical Contractors, Inc.,
839 P.2d 314 (Wash. 1992) 4
Cramer v. Consol. Freightways, Inc.,
209 F.3d 1122 (9th Cir. 2000) 2
Firestone v. Southern California Gas Co.,
2000 WL 986929, 164 L.R.R.M. (BNA) 2897
(9th Cir. July 19, 2000) 2
Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988) 4
Livadas v. Bradshaw,
512 U.S. 107 (1994) 2
Ramirez v. Yosemite Water Co., Inc.,
978 P.2d 2 (Cal. 1999) 3

Statutes

28 U.S.C. § 1257 1
29 U.S.C. § 185(a) 1
Wash. Admin. Code § 296-128-540 3

I. THE COURT HAS JURISDICTION TO REVIEW THE WASHINGTON COURT OF APPEALS' DECISION

Respondents initially challenge this Court's jurisdiction to review the decision of the Washington Court of Appeals. (Opp. at 1) But in doing so, they ignore this Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). In *Belknap*, a state trial court held that a state-law claim was preempted by federal labor law, and granted summary judgment. *See id.* at 497. The state appellate court reversed, and the state Supreme Court denied review. *See id.* The employer then sought certiorari.

This Court held that its "jurisdiction to affirm or reverse the [state] Court of Appeals . . . is clear." *Id.* at 497 n.5. Specifically, *Belknap* held that the judgment of the state appellate court was final within the meaning of 28 U.S.C. § 1257 because it "finally disposed of the federal preemption issue" and "to permit the proceedings to go forward without resolving the preemption issue would involve a serious risk of eroding the federal [preemption] policy." *Id.* The procedural posture in this case is identical, and thus, the Court likewise clearly has jurisdiction.

II. RECENT AUTHORITY INDICATES THAT THE CONFLICT OVER SECTION 301 PREEMPTION IS DEEPENING

In its opening submission, Petitioner noted the substantial confusion—and resulting conflicting decisions—over the proper approach to Section 301[1] preemption of so-called "independent" state-law claims, such as the wage claims presented here. (Pet. at 12-15) Even Respondents acknowledge the "confusing" state of the law (Opp. at 5), and

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[1] Labor Management Relations Act, 29 U.S.C. § 185(a)

recent authority—in the very federal judicial circuit encompassing Washington—indicates that this confusion is generating a deepening conflict.

Specifically, in *Firestone v. Southern California Gas Co.*, 2000 WL 986929, 164 L.R.R.M. (BNA) 2897 (9th Cir. July 19, 2000), the Ninth Circuit held that state wage and hour claims for overtime pay were preempted by Section 301. *See* 164 L.R.R.M. at 2899. The *Firestone* Court, like the earlier Seventh Circuit decision in *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 500-01 (7th Cir. 1996) (cited in Pet. at 14), rejected the plaintiffs' argument based on *Livadas v. Bradshaw*, 512 U.S. 107 (1994) and, instead, affirmed the lower court's ruling that the overtime claims were preempted because "resolution of the essential dispute between the parties about the applicability of the [state overtime] exemption"—the virtually identical issue in this case—required interpretation of the collective bargaining agreement. *Firestone*, 164 L.R.R.M. at 2899. This approach by the Seventh and now Ninth Circuits stands in sharp conflict with the approach taken by the Washington courts, which read *Livadas* to mean that the independent legal character of the state overtime claim make Section 301 preemption unwarranted.

A further conflict is reflected by the Ninth Circuit's recent decision in *Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122 (9th Cir. 2000). In *Cramer*, the Court held that torts for privacy invasion and intentional infliction of emotional distress—which depend on the reasonableness of employee expectations about privacy and the relationship between the parties—were preempted since the collective bargaining agreement "inevitably inform[ed]" these subjective determinations. *Id.* at 1127, 1131. But here, in contrast, the Washington court found no preemption, even though the substantive issue—*i.e.*, whether respondents are outside salesmen and thus excluded from Washington overtime requirements—turns on a determination of the parties' intent

regarding the "purpose" of Respondents' jobs. *See* Wash. Admin. Code § 296-128-540; *see also Ramirez v. Yosemite Water Co., Inc.*, 978 P.2d 2, 13 (Cal. 1999) (noting that evaluation of outside sales exemption requires consideration of not only an employee's evidence, but also the "employer's realistic expectations"). Had this issue been presented in federal court in Washington, that court, following *Cramer's* preemption analysis, would have found Washington's subjective "outside salesman" standard to be "inevitably inform[ed]" by the collective bargaining agreement between Petitioner and Respondents' union. *See* 209 F.3d at 1131. But since the parties were in state court, the court below ignored the collective bargaining agreement, and thus Petitioner's evidence of the parties' intent, in its preemption analysis. *See* Pet. App. at 11a.

Certiorari should be granted to review and resolve the conflict over preemption of independent state claims, like the wage claim here, and to clarify the proper preemption approach where resolution of the state claim depends on a determination of the parties' intent.

III. THE PETITION DOES NOT INVOLVE AN ARBITRATOR'S POWER TO ADJUDICATE STATE CLAIMS

Ignoring the conflicting decisions over Section 301 preemption of independent state claims, Respondents' main argument for denying the petition is an exercise in misdirection. Respondents seek to frame the issue as whether an arbitrator can decide state-law claims. (Opp. at 5-6) But this petition poses no such issue. The Section 301 preemption issue is entirely distinct from the arbitrability of Respondents' state-law wage claim. Rather, Section 301 preemption turns on the extent to which resolution of a state claim involves interpretation of a collective bargaining agreement. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 413 (1988). If Respondents' wage claims are preempted under

Section 301, then they are substantively extinguished in favor of the remedies provided in the collective bargaining agreement—including the general grievance and arbitration procedure for challenging classifications, and the special Route-Review Procedure that enables route salesmen to have their routes reviewed and restructured. And contrary to Respondents' assertion (Opp. at 5), protecting the parties' expectations that disputes about job classifications would be resolved through one of these mutually-agreed-to procedures is exactly the policy that Section 301 preemption is designed to protect. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

IV. WASHINGTON'S APPROACH TO SECTION 301 PREEMPTION CONFLICTS WITH THIS COURT'S APPROACH

Finally, Respondents seek to defend Washington's per-se Section 301 preemption test as an accommodation of the state's interest in enforcing its wage and hour laws. (Opp. at 6) And the test certainly does further the state's interest; after all, it allows state claims to escape preemption if plaintiffs can merely *assert* their claim without referencing the collective bargaining agreement. *See Commodore v. Univ. Mechanical Contractors, Inc.*, 839 P.2d 314, 319 (Wash. 1992). But defending the test on this basis proves too much. The flaw with Washington's approach is not that it does not adequately protect Washington's interests, but rather that it conflicts with this Court's decisions indicating the need to balance state interests with the federal policies animating Section 301 preemption. *See, e.g., Lueck*, 471 U.S. at 220; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987). The Washington analysis in *Commodore* and in the decision below allows self-serving plaintiffs to avoid preemption through artful pleading, and allows state courts to ignore obviously relevant evidence in the collective bargaining agreement, as well as the parties' bargaining history, in deciding issues of federal preemption.

Because Washington's approach, as illustrated in the opinion below, plainly deviates from this Court's jurisprudence, review is necessary to clarify the Section 301 preemption test and bring the Washington courts in line with this Court's decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 24, 2000